SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

44

No. 44

ROBERT FRAZIER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR ROBERT FRAZIER, PETITIONER

MILTON CONN,
M. EDWARD BUCKLEY, JR.,

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Opinion Below

The opinion in the United States Court of Appeals for the District of Columbia (R. 99-101), is reported at 163 F. (2d). 817.

Jurisdiction

The judgment of the Court of Appeals was entered on October 6, 1947. (R. 102). The petition for a writ of certiorari and petition to proceed *in forma pauperis* were filed

on December 5, 1947 and were granted April 19, 1948 (R. 103). The jurisdiction of this Court rests upon Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37(b)(2) and 45(a), Federal Rules of Criminal Procedure.

Questions Presented

1. Whether petitioner was denied a trial by an impartial jury because the jury consisted of twelve employees of the United States Government, among whom one juror was employed in the Office of the Secretary of the United States Treasury Department and another juror's wife was employed in the Office of the Secretary of the United States Treasury Department, the Secretary of the Treasury being the person charged with the administration and enforcement of the narcotic laws, as well as the Internal Revenue laws of the United States.

2. The jury before whom the petitioner was tried did not represent a proper cross section of the community, the prospective members of which were unlawfully permitted to arbitrarily and capriciously determine whether or not they would serve as jurors.

Statutes Involved

Harrison Narcotic Act, Section 2553a, Title 26, U. S. Code (Internal Revenue Code) (R. 90). See Appendix D. See also Appendix A, B, C, E and F.

Statement

Petitioner was indicted on June 5, 1944 (R. 90), tried on October 9, 1946 (R. 1), and convicted on October 10, 1946 (R. 71-72), in the United States District Court for the District of Columbia.

The indictment contained one count, charging petitioner with purchasing narcotic drugs within the District of Columbia, said narcotic drugs at the time of purchase were not

in or from the original stamped package, contrary to Section 2553a, Title 26, U. S. Code (Internal Revenue Code) (R. 90). (Appendix D.)

Petitioner was sentenced to serve a term of twenty (20) months to five (5) years and to pay a fine of $2,000.00 (R. 89).

The jury which convicted the petitioner consisted of twelve (12) Federal Government employees after petitioner had exercised all his peremptory challenges. One of the twelve (12) government employed jurors was employed in the Office of the Secretary of the United States Treasury Department, although when asked by counsel for petitioner "Are any members of your immediate family employed in the Treasury Department?" juror, Alexander Moore, remained silent (R. 5), while juror, Benjamin Root, answered "My wife is in the Treasury Department". When asked what branch of the Treasury Department, his wife was employed, juror Root replied "The Secretary's Office" (R. 5). The Secretary of the Treasury is the person who Congress holds responsible for the administration and enforcement of the narcotic laws, as well as the Internal Revenue laws of the United States.

The petitioner having exercised his ten (10) peremptory challenges, the jury still consisted of twelve (12) Federal Government employees (R. 12-13), one of these twelve (12) government employed jurors being employed in the Office of the Secretary of the Treasury (R. 101), and one juror's wife being employed in the Office of the Secretary of the Treasury (R. 5).

These government employed jurors were challenged for cause (R. 12-13), as well as the other ten government employed jurors. Petitioner's motion and request were denied by the trial court (R. 13), and the twelve government employed persons were duly sworn as jurors in this case (R. 13).

Petitioner, relying upon the opinion of this Court, in the case of *United States* v. *Wood*, 299 U. S. 123, 149, is of the opinion that petitioner has been deprived of due process of law, in that petitioner did not receive a trial by a fair and impartial jury.

Petitioner challenged the entire panel before the trial on the grounds that the panel did not represent a proper cross section of the community. This motion of the petitioner was also denied (R. 12-13).

The method which was in effect at the time that this panel of jurors was selected for jury duty, was as follows: 500 prospective jurors were summoned to appear in Court for jury service on the 1st Tuesday of each month. Of this group of 500 persons, the clerk would ask how many did not desire to serve on jury duty, to raise their hands; if 250 raised their hands, they would be excused by the Clerk without giving any reason for not wanting to serve on jury duty. This method enables wage earners and businessmen to get out of serving on juries without stating any reason. This leaves the majority of the panels consisting mostly of government employees and housewives, which does not represent a proper cross section of the community. (*Thiel* v. *Southern Pacific Co.*, 321 U. S. 217. *Fay* v. *The People of the State of New York*, 332 U. S. 261.)

Petitioner contends that by this method of selection of jurors, he was denied due process of law and equal protection of the laws, in violation of the Fourteenth Amendment to the Federal Constitution.

Statement of Points

1. The trial court was improperly constituted and without power to subject petitioner to the pains and penalties of trial and sentence because the jury was not an impartial jury and the verdict and sentence herein are each illegal and void.

2. The verdict and sentence are each contrary to law. The verdict being rendered by a jury which did not represent a cross section of the community, and whose prospective members were unlawfully permitted to arbitrarily and capriciously determine whether or not they would serve as jurors, which determination usurped judicial power.

Summary of Argument

1. The trial court at the time of petitioner's trial was improperly constituted and therefore was then and there without power to subject petitioner to the pains and penalties of trial and liability of sentence herein, because the petitioner's trial jury below was not an impartial jury, in violation of the rights of petitioner guaranteed by the due process clause of the Fifth Amendment, and the impartial jury guarantee of the Sixth Amendment, which renders the verdict and sentence herein each unlawful and void because the same is against express provisions of the Constitution, which bounds and limits all jurisdiction.

2. The verdict and sentence herein are each contrary to the law because the same violate the provisions of law stated, and others, in points, and summaries of argument.

Argument

Point One

1. The Sixth Amendment to the Constitution requires that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury."

In *United States* v. *Wood*, 299 U. S. 123, 81 Law Ed. 78, 57 S. C. 177, it was held that:

> "In dealing with an employee of the Government, the Court would properly be solicitous to discover whether in view of the nature or circumstances of his

employment, or of the relation of the particular governmental activity to the matter involved in the prosecution or otherwise, he had actual bias, and, if he had, to disqualify him."

In the case of *United States* v. *Wood, supra,* the accused was on trial for theft from a store of a private corporation, whereas petitioner was on trial for violation of the Internal Revenue Statutes of the United States, namely, violation of the Harrison Narcotic Act, which statute the Supreme Court of the United States declared to be constitutional as a revenue measure and not as an attempt to interfere with the police power reserved to the States (*U. S.* v. *Doremus,* 249 U. S. 86).

Can it be seriously and considerately urged that petitioner was tried by an "impartial jury" when it is taken into consideration that petitioner, having exhausted his ten peremptory challenges, and having his challenge for cause denied as to all of the twelve government employed jurors, including jurors Alexander Moore and Benjamin Root, the former and the wife of the latter each being employed in the Office of the Secretary of the United States Treasury Department, which is the particular branch of the United States Government and the particular individual of the Government to whom Congress has placed the responsibility of administering and enforcing the narcotic laws, as well as the collection of such revenues. Because petitioner was being tried for a crime of violating the Harrison Narcotic Act, which is a violation of the Internal Revenue Code (Section 2553a, Title 26, U. S. Code), and the witnesses against petitioner included Federal Narcotic Agents, who are employees of the United States Treasury Department, a chemist, who is also an employee of the United States Treasury Department, and a fingerprint expert, an employee of the Federal Bureau of Investigation of the United States Department of Justice, it would be deemed ridiculous, if not

silly, for anyone to contend that petitioner was thus deprived of his liberty *by due process of law*, in a trial by a fair and "impartial" jury, such as he is guaranteed by the Fifth and Sixth Amendments of the Constitution.

In the case of *United States* v. *Wood*, *supra*, this Court said, at pages 145-146:

> "Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula. State courts enforcing similar requirements of state constitutions as to trial by jury have held that legislatures enjoy a reasonable freedom in establishing qualifications for jury service, although these involve a departure from common law rules. This principle was thus stated by the Court of Appeals of New York in *Stokes* v. *People*, 53 N. Y. 164, 173: 'While the Constitution secures the right of trial by an impartial jury, the mode of procuring and impaneling such jury is regulated by law, either common or statutory, principally the latter, and it is within the power of the legislature to make from time to time such changes in the law as it may deem expedient, taking care to preserve the right of trial by an impartial jury'. And in *Brown* v. *State*, 62 N. J. L. 666, 678; 42 Atl. 811, the Court of Errors and Appeals of New Jersey enunciated the same doctrine: 'The provision in our constitution (paragraph 8) that the accused should have a right to a speedy and public trial by an impartial jury, secured to the accused a right to a trial by an impartial jury by an express constitutional provision. The means by which an impartial jury should be obtained are not defined. In neither of the constitutional provisions on this subject is there any requirement with respect to challenges, or to the qualifications of jurors, or the mode in which the jury shall be selected. These subjects were left in the discretion of the legislature, with no restriction or limita-

tions, except that the accused should have the right to be tried by an impartial jury'."

Petitioner here finds himself in a much different position than the defendant in the case of *United States* v. *Wood*, *supra*. Petitioner here is charged, not with the larceny from some private corporation, which any juror, whether employed by the government, or not, could sit and hear the evidence, and render a fair and impartial verdict, but petitioner herein was charged with the particular crime which, doubtless would be of special interest to employees in certain governmental departments of the United States.

It will be observed that the employment of both jurors Moore and the wife of Root were in the very department to the affairs of which the alleged offense related. *Higgins* v. *United States*, 160 F. 2d 222 (App. D. C.), certiorari denied, 331 U. S. 822.

As set forth in the opinion of the Supreme Court of the *Wood* Case, *supra*,

> "And what appears to be so obviously true in this case of larceny from a private corporation, would be true also in criminal prosecutions in general, running the gamut of offenses from murder, burglary and robbery to cheats and disturbances of the peace.
>
> "We think that the imputation of bias simply by virtue of Governmental employment, without regard to any actual partiality, growing out of the nature and circumstances of particular cases, rests on an assumption without any rational foundation.
>
> "It is said that particular crimes might be of special interest to employees in certain Government Departments, as, for example, the crime of counterfeiting, to employees of the Treasury. But when we consider the range of offenses and the general run of criminal prosecutions, it is apparent that such cases of special interest would be exceptional.
>
> "The law permits full inquiry as to actual bias in any such instances. We repeat, that we are not dealing with

> actual bias, and, until the contrary appears, we must assume that the Courts of the District, with power fully adequate to the occasion, will be most careful in those special instances, where circumstances suggest that any actual partiality may exist, to safe-guard the just interests of the accused."

This, the trial court failed to do by denying petitioner's motion to challenge the jury for cause (R. 12-13), and thereby occasioned the deprivation of petitioner's liberty without due process of law, Fifth Amendment of the Constitution of the United States.

In *Glasser* v. *United States*, 315 U. S. 60, 71, it is held that:

> "Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused."

While the juror must decide for himself whether his opinion is such as to prevent an unbiased verdict, yet he is not the judge of his own competence, of his own impartiality, and of his own freedom from prejudice. No statute can clothe him with such judicial discretion and power. The competency of the juror is left to the discretion of the court. *Com.* v. *Webster*, 5 Cush. (Mass.) 295, 52 Am. Dec. 711; *Scribner* v. *State*, 3 Okla. Crim. 601, 108 Pac. 422, 35 L. R. A. (N. S.) 985; *Com.* v. *Minney*, 216 Pa. St. 149, 65 Atl. 31, 116 A. S. R. 763 and note.

To this end the judge may have recourse to any means of information within his power. In fact he should carefully investigate every source which would be calculated to throw any light upon the competency of a juror, and if the judge is not entirely satisfied of the competency of the juror, he should be excused. *State* v. *Aaron*, 4 N. J. L. 231, 7 Am. Dec. 592; *Scribner* v. *State*, 3 Okla. Crim. 601, 108 Pac. 422, 35 L. R. A. (N. S.) 985 and note.

If the challenge for cause is overruled, and if the juror answers the statutory questions so as to qualify himself, he stands before the court as a competent juror, and he can not be called on to disqualify himself. If placed on the court as a trier and his qualifications are brought to the attention of the court by evidence other than that of the juror, then the court should determine the question as to whether he is a competent juror or not, and ask him such questions only as he under the law would be compelled to answer if called as an ordinary witness, and then determine his competency, according to the circumstances of the case, from the extrinsic evidence, as well as the statement of the juror. *Ryder* v. *State*, 100 Ga. 528, 28 S. E. 246, 62 A. S. R. 334, 38 L. R. A. 721.

The rule of the common law on this subject is thus stated by Blackstone:

> "Jurors may be challenged propter affectum, for suspicio of bias or partiality. This may be either a principal challenge, or to the favor. A principal challenge is such, where the cause assigned carries with it prima facie evident marks of suspicion either of malice or favor: as, that a juror is a kin to either party within the ninth degree; that he has been arbitrator on either side; that he has an interest in the cause; . . . that he is the party's master, servant, counselor, steward, or attorney . . . all these are principal causes of challenge; which, if true, can not be overruled, for jurors must be omni exceptione majores." 3B1 Com. 363. See also Thompson & M. Juries, P. 176.

By overwhelming weight of authority this rule is recognized in this country; and there is no provision of our Constitution changing it or impairing its vigor.

In the case of *Crawford* v. *United States*, 212 U. S. 183, 196, this Court said:

> "Bias or prejudice is such an elusive condition of the mind that it is most difficult, if not impossible, to

always recognize its existence, and it might exist in the mind of one (on account of his relations with one of the parties) who was quite positive that he had no bias, and said that he was perfectly able to decide the question wholly uninfluenced by anything but the evidence. The law therefore most wisely says that with regard to some of the relations which may exist between the juror and one of the parties, bias is implied, and evidence of its actual existence need not be given.

"The position of the juror in this case is a good instance of the wisdom of the rule. His position was that of an employe, who received a salary from the United States, and his employment was valuable to him, not so much for the salary as for the prospect such employment held out for an increase in his business from the people who might at first come to his store for the purchase of stamps, etc. It need not be assumed that any cessation of that employment would actually follow a verdict against the Government. It is enough that it might possibly be the case, and the juror ought not to be permitted to occupy a position of that nature to the possible injury of a defendant on trial, even though he should swear he would not be influenced by his relations to one of the parties to the suit in giving a verdict. It was in error to overrule the defendant's challenge to the juror."

A few cases only need be cited in which it has been held that it is error to permit a clerk or employee of a private party or a corporation to sit as a juror over the objection of the opposite party; *Central R. Co.* v. *Mitchell*, 63 Ga. 173, 179; *Hubbard* v. *Rutledge*, 57 Miss. 7, 12; *Louisville, N. W. & T. R. Co.* v. *Mask*, 64 Miss. 738, 744, 2 Sol. 360; *Burnett* v. *Burlington & M. R. Co.*, 16 Neb. 332, 334, 20 N. W. 280; *Omaha & R. Valley R. Co.* v. *Cook*, 37 Neb. 435, 55 N. W. 943; *Houston & R. C. R. Co.* v. *Smith* (Tex. Civ. App.) 51 S. W. 506; *Michigan Air Lines R. Co.* v. *Barnes*, 40 Mich. 383, 385.

In *Louisville, N. O. & T. R. Co.* v. *Mask, supra,* the Court said:

> "It does not matter that he had the self-confidence to swear that he could try the cause impartially. It was not for him to determine his competency on that point. When the fact was developed that he was in the employment of appellant the law adjudged him incompetent. The law does not lead jurors into the temptations of a position where they may secure advantage to themselves by doing wrong, nor permit the possibility of the wavering balance being shaken by self-interest."

These were all civil cases. For stronger reasons the doctrine applies in criminal prosecution.

Within a few lines, the Federal Constitution provides: "No person shall . . . be deprived of life, liberty or property, without due process of law; . . . (5th Amdt.) (and that) . . . In all criminal prosecutions, the accused shall enjoy the right to . . . trial by an impartial jury of the . . . United States wherein the crime shall have been committed . . . (6th Amdt.)."

In the case of *Washington* v. *Seattle,* 170 Wash. 371, 16 Pac. 2d 597, the Court held that in an action against a city for personal injuries, a woman, whose husband was in the employ of the city, and for that reason was himself subject to challenge for implied bias, was also disqualified; the Court said that inasmuch as the wife had a direct and immediate interest in the compensation received by her husband, as a result of his employment, was presumptively community property, the reasoning that would imply bias on his part would affect his wife to the same extent.

The law, therefore, most wisely says, that with regard to some of the relations which may exist between these Government employed jurors and one of the parties, bias may be implied, and evidence of its actual existence need not be

adduced. Therefore, petitioner most respectfully contends that the employment relationship existing between these Government employed jurors and the governmental department in which they are employed necessarily implies bias and that petitioner's motion and request that they be challenged for cause should not have been denied by the trial court (R. 12-13).

The Government contends in its memorandum in opposition to the granting of the petition for a writ of certiorari that "Although petitioner had full opportunity to examine the prospective jurors and exercise this right, he did not see fit to inquire whether any of them was an employee of the Treasury Department, but asked only whether any members of their immediate family were employed in that department". Petitioner not only meant, but felt that the above interrogation would certainly be applicable to each individual prospective juror, who at that time was seated in the jury box and certainly each of the twelve prospective jurors who was asked this question is a member of his or her own immediate family.

In *Crawford* v. *United States, supra,* this Court said at pages 193-194:

> "Even though the juror was not a salaried officer of the Government, under *United States* v. *Smith*, 124 U. S. 525, which was founded upon a statute concerning a very different subject, and as to which different reasons might apply, and even though such an officer was only exempt under section 217, and not disqualified under section 215, yet we are of opinion that the objection actually made reaches beyond the mere question whether technically the juror was or was not a salaried officer of the Government, and that it reaches the question of the qualification of a juror by reason of his relations to the Government as a Post Office clerk or employee, in a sub-postal station, and whether such relations did not by law disqualify him from acting as a

juror in an action to which the Government was a party. The objection to the juror was evidently by reason of his relations to the Government, however described.

"In criminal cases courts are not inclined to be as exacting, with reference to the specific character of the objection made, as in civil cases. They will, in the exercise of sound discretion, sometimes notice error in the trial of a criminal case, although the question was not properly raised at the trial by objection and exception. *Wiborg* v. *United States*, 163 U. S. 632, 659.

"Under this rule the general character of the objection to the juror was fairly before the court, and therefore we think it proper to notice the alleged error in the reception of this juror and to decide it with respect to the general qualification of the juror under the law, without being tied down to the question of whether he was a salaried officer and so exempt, but not, as is contended, thereby disqualified to serve as a juror."

Point Two

The jurors depriving petitioner of his liberty herein were initially selected by the trial court asking the men and women members of the panel to hold up their hands if they did not desire to serve (R. 12-13).

Thus selected jury did not comprise a due, impartial and fairly representative cross section "Of the . . . District wherein the crime shall have been committed." (6th Amdt.) because by such a request the trial court unlawfully abdicated its exercise of Judicial Power (Federal Constitution, Article III, Sec. 2) of judicially determining who had, and who had not, good and lawful cause for being judicially relieved, as to this cause, of the performance of their public duty of acting as jurors; and thereby the trial court unlawfully gave each person summoned for jury duty the privilege of deciding for themselves arbitrarily and capriciously whether he or she would perform such public duty.

Among the many potent reasons why the jury which deprived petitioner of his liberty was not an impartial and

fairly representative "cross-section of the . . . district wherein the crime shall have been committed." (6th Amdt.) the result of its undue and unlawful selection are typically that the jury did not comprise any of those:

(a) of the non-legal profession; and

(b) having business, or being executives, or persons of means, or bankers, or brokers, etc.

(c) earners of over $4.00 per day (the pay of jurors) of whom there are legion in these times of high wages and prices; which by the undue and unlawful process of selection employment herein, leaves in said district only those amiable ones willing to perform such public duty, who are either Government employees who draw their regular salaries while acting as jurors, or housewives for diversion at the modest jury fee of $4.00 per day.

9. The foregoing, being the unlawful reason why the trial jury below was composed solely of government employees, one of whom, Alexander Moore, was employed in the Office of the United States Secretary of the Treasury (R. 101) and juror Benjamin Root's wife was also an employee in the Office of the United States Secretary of the Treasury (R. 5), who is by law charged with the duty of administering and enforcing the narcotic laws, as well as the revenue laws of the United States, both of which violations were charged in the indictment herein. Said employment is admitted by the government in its answer to an application for bail pending appeal. See Sections 2550, 2552a, 2552b, 2553a, 2559a and 2560, of Title 26, U. S. Code. See Appendix A, B, C, D, E and F, hereto attached and made a part hereof.

Conclusion

For the reasons stated, it is respectfully submitted that the judgment of the Court of Appeals should be reversed and the case be remanded to the District Court.

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APPENDIX A

UNITED STATES CODE, TITLE 26

Internal Revenue Code, provides as follows:

Section 2550. Tax:

(a) Rate. There shall be levied, assessed, collected, and paid upon opium, coca leaves, any compound, salt, derivative, or preparation thereof, produced in or imported into the United States, and sold, or removed for consumption or sale, an internal revenue tax at the rate of 1 cent per ounce, and any fraction of an ounce in a package shall be taxed as an ounce. The tax imposed by this subsection shall be in addition to any import duty imposed on the aforesaid drugs.

(b) By whom paid. The tax imposed by subsection (a) shall be paid by the importer, manufacturer, producer, or compounder.

(c) How paid:

(1) Stamps. The tax imposed by subsection (a) shall be represented by appropriate stamps, to be provided by the Secretary.

(2) Assessment. For assessment in case of omitted taxes payable by stamp, see section 3311 and section 3640.

(3) Other methods. Whether or not the method of collecting any tax imposed by this section or by section 3220 is specifically provided therein, any such tax may, under regulations prescribed by the Secretary, be collected by stamp, coupon, serial-numbered ticket, or such other reasonable device or method as may be necessary or helpful in securing a complete and prompt collection of the tax. All administrative and penalty provisions of subchapters A, B and C of chapter 11, in so far as applicable, shall apply to the collection of any tax which the Secretary determines or prescribes shall be collected in such manner.

APPENDIX B

UNITED STATES CODE, TITLE 26

Internal Revenue Code, provides as follows:

Section 2552. Stamps:

(a) Affixing. The stamps provided in subsection (c)(1) of section 2550 shall be so affixed to the bottle or other container as to securely seal the stopper, covering, or wrapper thereof.

APPENDIX C

UNITED STATES CODE, TITLE 26

Internal Revenue Code, provides as follows:

Section 2552. Stamps:

(b) Other laws applicable. All the provisions of law relating to the engraving, issuance, sale, accountability, cancellation, and destruction of tax-paid stamps provided for in the internal revenue laws shall, in so far as necessary, be extended and made to apply to the stamps provided in subsection (c) (1) of section 2550.

APPENDIX D

UNITED STATES CODE, TITLE 26

Internal Revenue Code, provides as follows:

Section 2553. Packages:

(a) General requirement. It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in section 2550 (a) except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps for any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession

same may be found; and the possession of any original stamped package containing any of the aforesaid drugs by any person who has not registered and paid special taxes as required by sections 3221 and 3220 shall be prima facie evidence of liability to such special tax.

APPENDIX E

UNITED STATES CODE, TITLE 26

Internal Revenue Code, provides as follows:

Section 2559. Regulations:

(a) Making and publishing. The Secretary shall make, prescribe, and publish all needful rules and regulations for carrying the provisions of this subchapter and part V of subchapter A of chapter 27 into effect.

APPENDIX F

UNITED STATES CODE, TITLE 26

Internal Revenue Code, provides as follows:

Section 2560. Personnel:

(a) Appointment. The Secretary is authorized to appoint such agents, deputy collectors, inspectors, chemists, assistant chemists, clerks, and messengers in the field and in the Bureau of Internal Revenue in the District of Columbia as may be necessary to enforce the provisions of this subchapter and part V of subchapter A of chapter 27.